Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ALVIN EUGENE COATES,

Petitioner,

versus

VIRGINIA POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Based on the Unanimous Holding of this Court in *Reeves v. Sanderson Plumbing, Inc.*, the Fourth Circuit Inappropriately Applied the Pretext-plus Approach to the *McDonnell Douglas* Burden Shifting Paradigm Utilized in Title VII Discrimination Cases.

II. Whether plaintiff in a discrimination case who contends that his termination was the result of supervisor discrimination in a performance appraisals may raise an inference of discrimination by showing that the appraisal does not accurately reflect his performance.

III. Whether The Development of a Special Rule for Discrimination Cases That Evidence Contained in the Plaintiff's Affidavit Will Be Given No Weight in Determining Whether He Has Been the Victim of Discrimination Is Contrary to the Express Provisions of Rule 56 of the Federal Rules of Civil Procedure and the Numerous Holdings of the Supreme Court and the Courts in Other Circuits.

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Petitioner, Alvin Eugene Coates, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is referenced in a "Table of Decisions Without Reported Opinions" appearing at 213 F.3d 630. The unreported Court of Appeals opinion is reproduced in the Appendix ("App.") filed herewith at 1a. The unreported decision of the District Court is reproduced at 9a. The Order of the Court of Appeals denying a petition for rehearing *en banc* is reproduced at 19a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 2, 2000. Rehearing *en banc* was denied on May 31, 2000. The Court of Appeals mandate issued on June 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

The pertinent provisions of the Title VII of the Civil Rights Act of 1964, as amended, and is set forth below:

42 U.S.C. 2000e-2:

> (a) It shall be an unlawful employment practice for an employer--
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

> any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

STATEMENT OF THE CASE

The combined rulings of the Fourth Circuit allow employers to discriminate with impunity. All that the employer has to do is mark an employee for termination with a negative performance evaluation and later use the evaluation as justification for its decisions. First, the Fourth Circuit approach does not permit an employee to challenge bad performance evaluations as they are not deemed to qualify as adverse employment actions. Then, after the employee is fired based on the bad evaluation, the Fourth Circuit refuses to consider evidence that shows that the evaluation was the product of discrimination and will grant summary judgment against the

employee because, in the Fourth Circuit the court may "not sit to appraise [the supervisor's] appraisal." App. at 7a. Thus, Mr. Coates's claim that his termination was the product of discrimination was dismissed on summary judgment because he was not allowed to challenge adverse performance ratings when they were received. Then, after he was fired the court was unwilling to look at the motivation behind the same adverse performance evaluations which had precipitated his termination.

Because of the conjunction of these peculiar holdings, Alvin Coates did not have the possibility of a successful outcome when he sued the Virginia Power Company for discriminating against him by firing him from his position as a Construction Supervisor with twenty-four years of outstanding performance. It made no difference that Mr. Coates presented evidence that his supervisor's racial bias motivated him to manipulate Mr. Coates' knowledge, skills, and abilities ("KSA") ratings prior to a company-wide restructuring process to insure that Mr. Coates would not be competitive for retention. Bound by the "pretext-plus" standard applied by the Fourth Circuit prior to this Court's ruling in *Reeves v. Sanderson Plumbing Products, Inc.*, -- U.S. --, 120 S.Ct. 2097, 2108, -- L.Ed.2d -- (2000), the district court accepted Virginia Power's argument that Mr. Coates was terminated based upon an objective, essentially mathematical process which selected employees for retention or termination based upon their KSA ratings, and entered summary judgment on behalf of Virginia Power. *See* App. at 16a.

On appeal, the Fourth Circuit reiterated the pretext-plus standard:

> If the plaintiff can establish a prima facie case and the defendant then articulates a legitimate, non-discriminatory explanation for its action, the presumption created by the prima facie case "drops from the case," and the plaintiff bears the

> ultimate burden to prove that the defendant's proffered reason is pretextual and that the defendant intentionally discriminated against the plaintiff. plaintiff. See *Halperin*, [*v. Abacus Tech. Corp.*, 128 F.3d 191, 201 (4th Cir. 1997).] However, the plaintiff "cannot 'prevail on the ultimate issue merely by demonstrating that the defendant's proffered explanation for the adverse action is not true.' " Id. (quoting *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir.1995)). Rather, the plaintiff must prove that the proffered reason is false and that discrimination is the real reason for the adverse action. Id. (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). Mere speculation by the plaintiff that the defendant had a discriminatory motive is not enough to withstand a motion for summary judgment.

App. at 5a. The Court of Appeals thereupon affirmed the judgment of the district court stating that "Coates adduced no evidence that indicates Virginia Power's explanation is a pretext for discriminatory conduct or was racially motivated in any way" noting that there was no evidence that the managers who had evaluated Mr. Coates's KSA's were even aware of his race. *See* App. at 6a. With regard to Mr. Coates's evidence that his supervisor had discriminated against him when he lowered Mr. Coates's KSA scores in anticipation of the restructuring, the Court of Appeals stated, "[w]hile Coates believes some of his appraisals were unfair, 'we do not sit to appraise [the supervisor's] appraisal'" of Coates." App. at 7a (citing *Hawkins v. Pepsi Co., Inc.*, 203 F.3d 274, 278 (4th Cir. 2000)). Additionally, the Court of Appeals ruled that Mr. Coates's testimony relating to his first-hand knowledge of his own training and experience as well as the training and experience of

similarly-situated coworkers who were not fired could not be considered because it was a "self-assessment" which the Fourth Circuit found was "irrelevant as a matter of law." App. at 7a.

Petitioner therefore submits that a writ of certiorari should be granted because:

(1) The lower courts based their decision to enter and uphold summary judgment against Coates on a pretext-plus interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) which this Court recently specifically rejected in *Reeves v. Sanderson Plumbing Products, Inc.*

(2) Summary judgment is not proper in a discrimination case involving a termination during a "restructuring" where a plaintiff produces evidence that the performance ratings upon which the termination is based are the product of racial discrimination.

(3) Testimony by a plaintiff, based upon his personal knowledge of his own training and experience as well as the training and experience of similarly-situated coworkers who are treated favorably, is admissible in a Title VII discrimination case.

A. Background.

Alvin Coates ("Coates"), was one of the first African-Americans to traverse the racial barrier at Virginia Power Company ("appellee") when he began work in 1973 in its construction department, where he remained until his termination from its employ on May 12, 1997. *See generally United States v. Virginia Electric and Power Co.*, 1971 U.S. Dist. LEXIS 11799; 4 Empl. Dec. (CCH) P7502 Prac. (E.D. Va. 1971) (stating that in a settlement agreement, Virginia Power

agreed to refrain from future discrimination). Mr. Coates served as a construction Groundman for five years -- from 1973 until his promotion in 1978 to Lineman. Five years later he was promoted to First Class Lineman. Within two years, he was made the Lead Lineman of his crew and served as acting supervisor of his crew for a year or more before his 1994 promotion. Mr. Coates also received continual praise for his performance as acting supervisor in each of these positions, especially from his supervisor, Carl Vesey.

In 1994, Mr. Coates was promoted to the position of Supervisor of Overhead Construction in the company's Woodbridge District. However, Mr. Coates almost did not accept the promotion, since he feared that he would be subjected to racially hostile treatment if he worked for Marty Travis, the manager of Construction in the Woodbridge District.

Ultimately, Mr. Coates accepted the position and was treated by Mr. Travis "in a nasty, snippy, disrespectful and unfriendly tone, while addressing all the other white employees in a respectful manner." During Mr. Coates's first month in the Woodbridge District, there was a supervisors meeting, in which each supervisor was supposed to provide input to the discussion. However, each time Mr. Coates attempted to offer comments he was told "to shut up, listen, and learn something," while each white supervisors was allowed to speak freely and offer suggestions. During snow storms, Mr. Travis did not allow Mr. Coates to take breaks with his crew when it was on a mandatory safety break even though he allowed white supervisors to take a break and even when Mr. Coates had worked a consecutive 24 hours. Furthermore, Mr. Coates was the only employee to be on call each year for either Christmas or Thanksgiving. Even though Mr. Coates knew that Mr. Travis had singled him out for unfair treatment, he continued to perform his duties with enthusiasm.

Additionally, prior to the October 16, 1995, Million-Man-March in Washington, D.C., Mr. Travis told Mr. Coates that neither he nor any of his subordinates could have the day off work -- indeed Mr. Travis frequently grumbled and looked down on the event. To avoid raising Mr. Travis's ire, Mr. Coates decided not to go to the event. However, one of his black subordinates, Larry Byrd had already planned on attending the march. Despite the fact that Mr. Byrd properly submitted his request to have the day off work, and that it was subtracted from his allotted leave, Mr. Travis became irate when he found out. He then scolded, intimidated and interrogated both Mr. Byrd and Mr. Coates regarding Mr. Byrd's absence from work that day.

B. The Circumstances Surrounding Coates's Termination During a Restructuring Raise Issues of Material Fact with Respect to his Claim of Racial Bias.

Over his years at Virginia Power, Mr. Coates excelled in his job performance. In fact, prior to his promotion to the Woodbridge District he was said to have performed "real good" in the higher duties and provided strong leadership to his crew "all the way around." Indeed, in 1993, Mr. Coates's last appraisal before being promoted, he was rated at 1.0, which meant that "expectations [were] fully met and/or occasionally exceeded." Mr. Coates's supervisor at the time, Carl Vesey, stated that in his Fairfax District, which housed 60 to 70 lineman, Mr. Coates was far and away the best.

Mr. Coates was rated as performing on par with or exceeding the performance of his white co-supervisors in the Woodbridge District until very close to the time the restructuring plan was implemented, at which time his ratings dropped precipitously compared to his white colleagues.

In August of 1996, Mr. Travis's deputy over the Construction Department and Mr. Coates's immediate supervisor, Ed Bushee, favorably rated Mr. Coates's KSA's and Mr. Travis approved Bushee's ratings. By March 1997, however, all the managers, including Mr. Travis, knew that the KSA ratings would be used to determine who would retain their supervisory positions following the restructuring plan and who would be terminated. Thus, in March 1997, when Mr. Travis altered Mr. Coates's KSAs ratings, nearly cutting them in half, and replacing nearly every favorable comment made by Mr. Bushee with a negative one, he knew that he was marking Coates for termination.

On March 21, 1997, three days after Mr. Travis altered Mr. Coates's scores and after Mr. Bushee had been made aware that Mr. Travis had a "very dim view" of Mr. Coates, Mr. Bushee provided follow-up job specific ratings on Mr. Coates which reflected Mr. Travis's revised KSAs ratings. Mr. Travis was in a position to control Mr. Bushee's ratings of Coates because, at the same time that he was to provide the job specific ratings on Mr. Coates, Mr. Bushee also knew that his own job was in jeopardy during the upcoming restructuring plan and that Travis would be rating his KSAs.

Later during the Spring of 1997, the reorganization plan was implemented. The managers for the North/West region met to select who would remain in the supervisory positions based on a compiled list of each supervisor's KSAs. As a result of Mr. Coates's ratings after they were "revised" by Mr. Travis, he was too low on the list to remain competitive for any position. Thus, Mr. Coates's position was given to Jimmy Harpine, a white male who was assigned duties identical to those performed by Mr. Coates before the restructuring -- even though there was evidence that Mr. Harpine was less qualified than Mr. Coates and, with the exception of the critical revised ratings in March 1997, had been lower rated than Coates. For example, Mr. Coates who was familiar with Mr. Harpine's

background testified that Harpine was only qualified as to supervise underground construction while Mr. Coates was qualified to supervise both underground and overhead construction.

REASONS FOR GRANTING THE WRIT

I. Based on the Unanimous Holding of this Court in *Reeves v. Sanderson Plumbing, Inc.*, the Fourth Circuit Inappropriately Applied the Pretext-plus Approach to the *McDonnell Douglas* Burden Shifting Paradigm Utilized in Title VII Discrimination Cases.

Under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), burden shifting paradigm, once a plaintiff has established a prima facie case, the defendant must produce evidence of a legitimate, nondiscriminatory reason or reasons for its actions. *See McDonnell Douglas*, 411 U.S. at 802-805. The plaintiff is then given the opportunity to show that the articulated justification for the employer's action is merely pretextual. *Id.* However, a plaintiff may meet its burden at this stage through circumstantial evidence. Thus, the prevailing view even prior to this Court's holding in *Reeves*, was that a plaintiff may avoid summary judgment by demonstrating the existence of circumstantial evidence in the record from which a jury could conclude that the stated nondiscriminatory reason is not the true reason for the employer's acts or omissions. *E.g.*, *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997) (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997) (same), *cert. denied*, 522 U.S. 1045,

118 S.Ct. 685, 139 L.Ed.2d 632 (1998); *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998)(en banc); *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-72 (3d Cir.1996) (en banc)(citing and relying upon *Fuentes*, 32 F.3d at 764); *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 342-47 (6th Cir.1997); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir.1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir.1995), .

Recently, in *Reeves v. Sanderson Plumbing, Inc.*, this Court unanimously resolved the split in the Circuits regarding whether a plaintiff is required to provide some evidence not only that the employer's proffered reason was pretextual but that the real reason was discrimination. Pursuant to *Reeves*, once a plaintiff in a Title VII discrimination case has shown that the employer's articulated reason for the adverse employment action is false he may survive judgment as a matter of law. *See Reeves*, 120 S. Ct. at 2108-09. Thus, the Court specifically stated that "[i]t suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." *Id.* at 2109. Moreover, this Court noted that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 2010. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Id.* at 2108

In view of Mr. Coates evidence rebutting the claim that his termination was based upon the application of objective

criteria to his performance and conduct, his case should have been given to a jury. However, because of the Fourth Circuit's "pretext plus" approach, evidence that his supervisor's ratings falsely indicated that he was less qualified than a white co-worker was not deemed sufficient to prove intentional discrimination. This Court's holding in *Reeves* makes clear that the Fourth Circuit's pretext plus approach is not the proper interpretation of *Hicks*. Accordingly, this case should be remanded to the district court for a trial on the merits,

II. Having Promulgated a Rule That Supervisory Appraisals May Not Be Challenged When They Are Rendered, the Fourth Circuit Makes it Possible for the Employer to Discriminate with Impunity Because it Will Not Allow a Jury to Look Behind a Supervisor's Appraisal.

The Fourth Circuit has vigilantly held that it will not look behind a supervisor's performance evaluation. As the court stated in addressing Mr. Coates claims, "[w]e have repeatedly held that in a wrongful discharge action 'it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff.' " *See* App. at 7a (citing *Hawkins*, 203 F.3d at 278 (quoting *DeJarnette v. Corning Inc.*, 133 F.3d 293, 298 (4th Cir.1998)). Indeed, the Fourth Circuit will not permit a district court to consider whether a performance evaluation is accurate because, in its view, such consideration would be at odds with its commitment not to "sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination." *DeJarnette*, 133 F.3d at 298 (quoting *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir.1997)) (citing *EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir.1992)).

In a case such as the one advanced by Mr. Coates the supervisor's assessment is the basis for an adverse action taken by higher management. By refusing to allow evidence that an evaluation is discriminatory the Fourth Circuit effectively allows an employee to be fired by a two-step process which begins with a discriminatory evaluation and ends with an adverse action which is "objectively" based on the discriminatory evaluation -- without allowing a challenge of the evaluation. This is particularly unfair in view of the Fourth Circuit rule "that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of . . . Title VII, *see Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.1981), which, with increasing frequency, has been interpreted to mean that a performance evaluation is an "interlocutory or mediate decision" that is not actionable under Title VII. *Settle v. Baltimore County Police Dept.*, 203 F.3d 822 (unpublished table decision), 2000 WL 51283, at 1 (4th Cir. 2000); *Brice v. Equitable Bank, N.A.*, 946 F.2d 884 (unpublished table decision), 1991 WL 199866, at 5 (4th Cir. 1991).

In a Title VII race discrimination case, the plaintiff's burden is to prove intentional discrimination. Thus, the supervisor's thought-processes and reasons for acting are at the heart of the matter. In this case, the Fourth Circuit ruled that Coates's failure to establish pretext or actual discriminatory motive was supported by the fact that other managers, present at the meeting to select the supervisors who would remain following the Vision 2000 restructuring, selected African-Americans for the positions. Specifically, the Court stated that "if Virginia Power's managers intended to preclude African-Americans from supervisory positions, the evidence demonstrates that they could have selected some of the Caucasian supervisors that were dismissed with Coates to fill positions held by African-Americans." App. at 6a-7a. This

holding misses the point. Mr. Coates did not allege that company-wide discrimination led to his termination. The managers present at the restructuring meeting chose which supervisors would retain positions with the company after ranking the candidates based on their KSA scores. As such, the decision regarding which supervisors would retain their positions should have been based on objective criteria. The fact that the managers who were present at the meeting may not have been aware of or discussed Mr. Coates's race is not dispositive regarding whether Mr. Travis's racial animosity contributed to Mr. Coates's termination. In this regard, there is evidence that Mr. Travis harbored racial animus toward Mr. Coates. And it is clear that Mr. Travis altered Mr. Coates's KSA ratings, when he became aware of the impending restructuring process and as a result Coates was not in a position to compete for the remaining spots based on his low position on the KSA list. Therefore, there is a question of fact for a jury regarding whether Mr. Coates lost his job as a result of the racially biased treatment to which he was subjected by Mr. Travis.

By developing a rule which denies the plaintiff the opportunity to show that a performance evaluation is false, the Fourth Circuit effectively denies the plaintiff the opportunity to challenge a termination based on adverse comments in a false performance evaluation. In so doing, the Fourth Circuit denies the plaintiff the opportunity to show that the adverse ratings which formed the basis for his termination were a pretext for discrimination under *Hicks* and *Reeves*.

III. The Development of a Special Rule for Discrimination Cases That Evidence Contained in the Plaintiff's Affidavit Will Be Given No Weight in Determining Whether He Has Been the Victim of Discrimination Is Contrary to the Express Provisions of Rule 56 of the Federal Rules of Civil Procedure and the Numerous Holdings of the Supreme Court and the Courts in Other Circuits.

Summary judgment is proper only against "a party who fails to make a showing sufficient to establish the existence of any element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). Accordingly, to make the determination on a motion for summary judgment, the court must evaluate all of the evidence before it. *See Celotex Corp.*, 477 U.S. at 323. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court ruled that disputes over facts -- such as the motive of those involved in the creation of the evaluation which led to Mr. Coates's termination-- which might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Id.* at 248. Indeed, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 254, citing *Adickes v. S.H. Kress & Co.*,398 U.S. 144, 158-159 (1970); *Hill v. A-T-O*, Inc., 535 F.2d 1349 (2d Cir. 1976)(Court must accept as true factual statements in the opposing party's affidavits, draw all permissible inferences in that party's favor); *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988)(same), and *Burtnieks v. City of New York*, 716 F.2d 982, 983 (2nd Cir. 1983)(same); *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership*, 859 F.Supp. 1189, 1192 (N.D.Ind. 1994)(In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the

evidence or the credibility of witnesses.). Thus, the moving party must demonstrate that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp.*, 477 U.S. at 323. If the moving party meets this burden, the burden passes to the nonmoving party to establish the existence of a disputed factual element essential to his case with respect to which he bears the burden of proof. *See id.* Where the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, the motion for summary judgment cannot be granted. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Mr. Coates' testimony contained his personal observations about factual occurrences such as (1) being told by Mr. Travis that he could not speak during the supervisors' meeting, (2) being forced to work during snow storms without a break while other supervisors were allowed to take breaks, (3) being scheduled to work either Thanksgiving or Christmas each year, and (4) his experience supervising both underground and overhead construction as compared with Harpine, who could only supervise underground construction. Thus, there is ample evidence in the record to raise a material issue of fact about whether he was subjected to racial discrimination by Mr. Travis, which culminated in the alteration of his performance evaluations and finally the termination of his employment with Virginia Power. However, as an extension of the view that in a discrimination action "it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff," App. at 7a (quoting *Hawkins*, 203 F.3d at 278), the Fourth Circuit embraces a rule which effectively precludes consideration of a plaintiff's testimony when the court rules on a summary judgment motion in a discrimination case. However, the plaintiff's testimony is competent evidence. By adopting a rule which accepts the supervisor's statements but refuses to credit the plaintiff's testimony, the Fourth Circuit betrays the purpose for which Title VII was enacted visits upon the plaintiff a form

of discrimination which is just as cruel as that first which led to the employee to resort to the courts. Therefore, this Court should grant certiorari to make clear that like every other witness, the testimony of a plaintiff in a discrimination case is entitled to whatever weight the finders of fact are willing to give it.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and thereupon the decision of the Fourth Circuit Court of Appeals should be reversed and this matter should be remanded to the lower courts for further proceedings consistent with the ruling of this Court in *Reeves v. Sanderson Plumbing, Inc.*

Respectfully submitted,

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(Any footnotes trail end of each document)
No. 99-1028

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALVIN EUGENE COATES, Plaintiff-Appellant,

v.

VIRGINIA POWER COMPANY, Defendant-Appellee.

March 1, 2000, Argued

May 2, 2000, Decided

NOTICE:
RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

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JUDGES:
Before MICHAEL, Circuit Judge, G. Ross ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation, and James H. MICHAEL, Jr., Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION:

PER CURIAM:

Appellant Alvin Eugene Coates appeals from the granting of summary judgment for Virginia Power Company (Virginia Power). The district court held that Coates failed to present evidence sufficient to support his racial discrimination claim under *42 U.S.C.A. § 1981* (West 1994). Because Coates only presents speculative assertions supporting his claim that Virginia Power's reason for dismissal is pretextual, we affirm the district court's decision.

I.

Alvin Eugene Coates is an African-American man who worked for twenty-four years with Virginia Power. Coates began working with Virginia Power in 1973 at an entry-level position. Until his dismissal in 1997, Coates received several promotions, culminating in his highest appointment with Virginia Power in 1994 as the Supervisor Construction (Overhead) in Virginia Power's Construction Department for the Woodbridge District. As a Supervisor for the Woodbridge District, Coates worked under the supervision of Marty Travis, a Caucasian manager who served as Director of the Woodbridge District's Construction Department. Coates claims he experienced racial animosity from Travis and had suspected him of being racially biased before working for

him. Coates claims his promotion to Supervisor led to a series of events which resulted in his dismissal for discriminatory reasons.

In 1997 Virginia Power undertook a company-wide restructuring program known as Vision 2000. The restructuring eventually led to the elimination of many supervisory positions. In May 1997, more than twenty Virginia Power managers, including Travis, met in Richmond to select the supervisors who would be employed under the Vision 2000 plan. As the existing supervisors outnumbered the supervisory slots available, Virginia Power terminated some supervisors after the evaluation process, including Coates. The managers selected two whites and one African-American to work as supervisors in the Woodbridge District after the restructuring process. Also, Travis selected one African-American supervisor to work with him.

Coates believes Travis knew the organizational changes were on the horizon and took affirmative discriminatory steps to ensure that Coates would not have a position with Virginia Power upo[illegible]mpletion of Vision 2000. Employees at Virginia Power are rated on a regular basis. These ratings test the employees' knowledge, skills, and abilities, hence they are known as KSAs. Coates claims that after his promotion to Supervisor he unfairly received a significantly lower KSA rating for 1994 compared to his ratings in previous years. However, Coates claims by 1995 he again was rated among the highest of his peers. Additionally, on March 18, 1997, Coates asserts that Travis altered Coates's 1996 KSA to a negative assessment from a positive assessment in an effort to diminish the likelihood that Coates would work with Virginia Power after the Vision 2000 restructuring process. Coates further alleges that Ed Bushee, Coates's immediate supervisor, submitted KSA ratings which were significantly more negative than the KSAs Bushee had prepared for Coates in the past to curry favor with Travis during the Vision 2000 restructuring process.

Coates filed a complaint in the United States District Court for the Eastern District of Virginia, alleging discrimination and retaliation* on the basis of race under the Civil Rights Act of 1991, *42 U.S.C.A. § 1981.* The district court granted summary judgment on December 22, 1998. Coates asserts on appeal that he produced sufficient evidence to raise a material issue of fact with respect to whether Virginia Power's proffered reason for Coates's termination was a pretext to unlawful discrimination.

II.

The court reviews a grant of summary judgment de novo. See *Russell v. Microdyne Corp., 65 F.3d 1229, 1239 (4th Cir. 1995).* Because the district court dismissed Coates's claim on Virginia Power's motion for summary judgment, we view the evidence in the light most favorable to him. See *Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 768 (4th Cir. 1997).* Summary judgment is appropriate when "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* However, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991).*

III.

When a plaintiff presents a claim for employment discrimination with no direct evidence of discriminatory conduct, the case is "subject to the burden-shifting scheme of McDonnell Douglas." *Hawkins v. PepsiCo, Inc., 203 F.3d*

274, 278 (4th Cir. 2000) (citing *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)).* McDonnell Douglas requires a plaintiff to make a prima facie case of employment discrimination, which then shifts the burden of production to the employer to proffer some legitimate, nondiscriminatory reason for its action. See id. To establish a prima facie case of discrimination, a plaintiff must prove: (1) he is in a protected group; (2) he was discharged; (3) at the time of his discharge, he was performing his job at a level that met his employer's legitimate expectations; and (4) this discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. See *McDonnell Douglas, 411 U.S. at 802; Halperin v. Abacus Tech. Corp., 128 F.3d 191, 201 (4th Cir. 1997).* The burden of establishing a prima facie case of discrimination is not an onerous one for the plaintiff. See *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).*

If the plaintiff can establish a prima facie case and the defendant then articulates a legitimate, non-discriminatory explanation for its action, the presumption created by the prima facie case "drops from the case," and the plaintiff bears the ultimate burden to prove that the defendant's proffered reason is pretextual and that the defendant intentionally discriminated against the plaintiff. See *Halperin, 128 F.3d at 201.* However, the plaintiff "cannot 'prevail on the ultimate issue merely by demonstrating that the defendant's proffered explanation for the adverse action is not true.'" Id. (quoting *Jiminez v. Mary Washington College, 57 F.3d 369, 377 (4th Cir. 1995)).* Rather, the plaintiff must prove that the proffered reason is false and that discrimination is the real reason for the adverse action. Id. (citing *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)).* Mere speculation by the plaintiff that the defendant had a discriminatory motive is not enough to withstand a motion for summary judgment. See *Autry v. North Carolina*

Dep't of Human Resources, 820 F.2d 1384, 1386 (4th Cir. 1987); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-46 (4th Cir. 1982). Even if there is a genuine issue of material fact on the first prong of this test, the defendant is entitled to summary judgment if the plaintiff cannot establish the second prong--discrimination as the basis for the adverse action. See *Gillins v. Berkeley Elec. Coop., Inc., 148 F.3d 413, 416-17 (4th Cir. 1998); Vaughan v. Metrahealth Cos., 145 F.3d 197, 201-02 (4th Cir. 1998).*

IV.

After reviewing the evidence in the light most favorable to the Appellant, we find that Coates has made out a prima facie case of discrimination. Therefore, Virginia Power must produce and articulate a legitimate, non-discriminatory reason for its conduct. Virginia Power maintains that changes in the utilities market required it to alter its business and operations to ensure its success in future years. Virginia Power started a restructuring process called Vision 2000 to accomplish its goals. Vision 2000 required Virginia Power to eliminate hundreds of positions.

Having articulated a legitimate, non-discriminatory reason for its conduct, Virginia Power shifted the burden back onto Coates to show pretext. Coates adduced no evidence that indicates Virginia Power's explanation is a pretext for discriminatory conduct or was racially motivated in any way. No evidence suggests that the approximately twenty managers selecting supervisors were aware of employees' race or even discussed race during their meetings. The evidence does show that Travis selected an African-American to work for him and that the Woodbridge District's new manager selected an African-American to work as a supervisor in the district. Furthermore, if Virginia Power's managers intended to preclude African-Americans from supervisory positions, the evidence demonstrates that they could have selected some of the Caucasian supervisors that

were dismissed with Coates to fill positions held by African-Americans.

Although Coates contends he was better qualified than anyone selected for the Woodbridge positions, his self-assessment is irrelevant as a matter of law. "We have repeatedly held that in a wrongful discharge action 'it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff.'" *Hawkins, 203 F.3d at 280* (quoting *DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998)* (internal quotation marks omitted)). While Coates believes some of his appraisals were unfair, "we do not sit to appraise [the supervisor's] appraisal" of Coates. Id. Instead, "'our sole concern is whether the reason for which the defendant discharged the plaintiff was discriminatory.'" Id. (quoting *DeJarnette, 133 F.3d at 299).* Throughout his arguments, Coates merely speculates that Virginia Power's legitimate, non-discriminatory reason for its conduct is actually a pretext for discrimination.

For us to reverse the district court's decision, Coates would need to present some legally sufficient evidence of discrimination, not conjecture or speculation. If we were to require less in this case, "supervisors . . . could not evaluate employees of a different race without the prospect of a lawsuit." *203 F.3d at 282.* We therefore affirm the district court's decision to grant Virginia Power's motion for summary judgment.

AFFIRMED

No. 98-488-A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALVIN EUGENE COATES, Plaintiff,

v.

VIRGINIA POWER COMPANY, Defendant.

December 22, 1998, Decided

ORDER

This matter comes before the Court on Defendant's Motion for Summary Judgment. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion is GRANTED, and this case is DISMISSED.

No. 98-488-A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALVIN EUGENE COATES, Plaintiff,

v.

VIRGINIA POWER COMPANY, Defendant.

December 22, 1998, Decided

MEMORANDUM OPINION

This matter comes before the Court on Defendant's Motion for Summary Judgment Plaintiff alleges race discrimination in violation of 28 U.S.C. § 1981.[1]

Plaintiff, Alvin Coates ("Coates"), a 44 year-old African-American man, worked for Defendant, Virginia Power, for more than 24 years. He was first hired by Virginia Power (which was at that time known as Virginia Electric and Power Company, or Vepco) in 1973.

Coates' first position was that of Ground Man in the Construction Department at Virginia Power's Fairfax District. After five years at that job, in 1978 Coates was promoted to the position of Lineman. In *1983.* Coates was again promoted, this time to the position of First Class Lineman Within two years of that promotion, Coates was made Lead Lineman of his crew.

Coates was highly praised for his performance, both by his superiors and by Virginia Power customers, as he rose through the ranks at Virginia Power This paid off for Coates, for in 1994 he was promoted to the position of Supervisor, Overhead Construction at Virginia Power's Construction Department in their Woodbridge District. It is his promotion to this position which set into motion the series of events which eventually led, Coates claims, to his dismissal from Power for discriminatory reasons.

In his new position, Coates claims he experienced racial animosity at the hands of Marty Travis ("Travis"), Director of Construction or Director of Customer Projects of the Woodbridge District. Coates testified he suspected Travis was racially biased before he took the job.

Employees at Virginia Power are rated on a regular basis. These ratings test the employees' knowledge, skills and abilities, hence they are known as KSAs. Coates claims that after his promotion to Construction Supervisor at the Woodbridge District his KSA eating for 1994 dropped precipitously as compared with previous years. However, by 1995 Coates claims he was again rated among the top-rated of his peers. In 1997 Virginia Power undertook a company-wide restructuring, known as Vision 2000. This restructuring eventually led to the elimination of many supervisory positions. As the existing supervisors outnumbered the supervisory slots available, some supervisors were terminated after the evaluating process, including Coates.

In May, 1997. more. than 20 Virginia Power managers, including Travis, met in Richmond, Virginia to select the supervisors who would be employed under the Vision 2000 plan Coates was not selected, and was subsequently informed that his employment with Virginia Power was terminated.

It is Coates' belief that in March, 1997, Travis became aware that organizational changes were coming, and that Travis then took affirmative discriminatory steps to ensure that Coates would not have a position at Virginia Power after Vision 2000 was implemented. To wit, Coates alleges that on March 18, 1998 Travis went back and negatively affected Coates' August, 1996 KSA (which was prepared by Coates' immediate supervisor, Ed Bushee; Coates claims the unedited version of the August, 1996 KSA was quite favorable to him) so that Coates' likelihood of employment after the restructuring process would diminish. Coates alleges that in most rating categories, Travis cut Coates' rating in half. Further, in every place where Bushee had written favorable comutents about Coates' knowledge, skills and abilities. Travis now struck them out and replaced them with decidedly negative comments. Coates alleges that Travis did this notwithstanding the fact that he had previously approved Bushee's August, 1996 KSA.rating of Coates, and notwithstanding the fact that Bushee opposed Travis' decision to alter the August, 1996 KSA. Travis did not revise the previous KSAS of any of the white supervisors who worked in the Woodbridge District.

As stated above, it is alleged by Coates that his August, 1996 KSA was revised by Travis on March 18, 1997. Coates further alleges that three days later (March 21, 1997) Bushee Prepared follow-up, job-specific KSAs for the supervisors in the Woodbridge District. These follow-up, job-specific KSAs were also to be used in the Vision 2000 process to help determine who would be selected as supervisors. Even though Bushee had protested Travis's revision of Coates' August, 1996 KSA on March 18, 1997, Bushee now prepared a follow-up, job-specific KSA for Coates which was decidedly more negative than the KSAs Bushee had prepared for Coates in the past.

It is Coates' contention that the reason Bushee rendered a low follow-up, job-specific KSA for Coaxes in March, 1997 is that Bushee became aware of Travis' true feelings towards Coates, and Bushee wanted to curry favor with Travis. Bushee's reason for currying favor with Travis, Coates contends, is that Travis was in the process of preparing a KSA for Bushee. Because Bushee did not want to receive a KSA which would jeopardize Bushee's prospects wider the Vision 2000 regime, Coates contends Bushee prepared a follow-up, job-specific KSA for Coates which would meet with Travis' approval.

Coates feels discrimination was the root cause of his termination because a white supervisor he had worked with at the Woodbridge District was retained by Virginia Power, even though the supervisor had less experience, less qualifications, and a poorer history of KSA ratings Hence, Coates has now brought suit under 28 U.S.C. § 1981, claiming race discrimination in the termination of his employment.

Coates stated in his deposition that his problems stemmed not so much from the actions of Virginia Power, but rather from the actions of Travis. It was Travis' actions which ultimately led to Coates' termination from Virginia Power, Coates contends. But when asked in his deposition what specific proof Coates had of Travis' racism, Coates responded that he had a preconceived notion that Travis was racist before he even met him. After Coates met Travis, Coaxes said that it was Travis' "behavior" which indicated that Travis was a racist. When asked what it was about Travis' behavior that led Coates to conclude this, Coates' response was "I can't be specific to you. I know."[2]

Coates has not met his burden of establishing a genuine issue of material fact in dispute on the issue of pretext. While Coates speculates that Travis' revision of

Coates' August, 1996 KSA put him on unequal footing with his peers for purposes of the Vision 2000 selection process, the undisputed facts indicate that Travis put the revised KSA in his desk drawer and did not submit it to be used in the Vision 2000 pooling process. Instead, he submitted the unedited version of the August, 1996 KSA for the pooling process.

Coates also claims that after Travis suggested revising Coates' August, 1996 KSA, Bushee might then have given Coates lower job-specific KSA ratings than were merited in an effort to please Travis However, Bushee indicated, when asked in his deposition, that he evaluated Coaxes' job-specific KSAs before meeting with Travis. Further, Bushee indicated that Travis had already performed Bushee's job-specific KSAs when they met to discuss whether revising Coates' August, 1996 KSA would be appropriate. Coates comes forward with no facts, only his conclusion, as to the reason for Bushee's actions. Coates has absolutely no evidence that the committee making the decisions about who to keep and who to let go had any racial motivations of any kind in this decision.

Summary judgment is appropriate when there is no genuine issue as to any material fact. Fed. R Civ. P. 56(c). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). A material fact in dispute appears when its existence or nonexistence could lead a jury to different outcomes. See Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the nonmoving party Ash v. United Parcel Serv. Inc, 800 F.2d 409,411-12 (4th Cir. 1986) Summary judgment is appropriate when, after discovery, a party has failed to wake a "showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at; trial." Celotex Corp. v. Catrert, 477 U.S. 317, 322 (1986). When a motion for summary judgment is made, the evidence presented must always be construed in the light most favorable to the nonmoving party Smith v. Virginia Commonwealth Univ., 84 F.3d 672, 675 (4th Cir. 1996)(en bane). Summary judgment is appropriate in employment discrimination cases in which there is no genuine issue of material tact. See. e.g. Ennis *v* National Ass'n of Bus & Educ. Radio. Inc, 53 F.3d 55. 62 (4th Cir. 1995); Gillins *v.* Bcrkeley Elec Coop, 148 F.3d 413 (4th Cir. 1998): Vaughan v. Metraheatth 145 F.3d 197 (4th Cir. 1998).

To establish a prima facie case of discrimination, a plaintiff must prove: (1) he is in a protected group; (2) he was discharged; (3) at the time of his discharge, he was performing his job at a level that met his employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination See McDonnell Douglas Corp. v Green. 411 U.S. 792, 802 (1973); Halperin v. Abacus Tech. Corp., 128. F3d 191, 201 (4th Cir. 1997). The burden of establishing a prima ftwie case of discrimination is nor an onerous one for the plaintiff. Texas Dep't of Community Affairs v. Burdine. 450 U.S. 248. 253 (1981).

If the plaintiff can establish *a prima facie* case and the defendant then articulates a legitimate nondiscriminatory explanation for its action, the presumption created by the *prima facie case* "drops from the case," and the plaintiff bears the ultimate burden to prove that the defendant's proffered reason is pretextual, and that the defendant intentionally discriminated against the plaintiff Halperin 128 F.3d at 201. The plaintiff "cannot 'prevail on the ultimate issue merely by demonstrating that the defendant's proffered explanation for the adverse action is not true." (quoting

Jiminez v. Mary Washington College. 57 F.3d 369, 377 (4th Cir.), cent. denied. 516 U.S. 94-4 (1995)). Rather, the defendant must prove that the proffered reason is false, and that discrimination is the real reason for the adverse action. Id. (citing St. Mary's Honor Ctr v. Hicks. 509 U.S. 502, 515 (1993)). Mere speculation by the plaintiff that the defendant had a discriminatory motive is not enough to withstand a motion for summary judgment. See Autry *v.* North Carolina Dep't of Human Resources. 820 F.2d 1384, 1386 (4th Cir. 1987); Lovelace v, Sherwin-Williams Co., 681 F.2d 230, 241-46 (4th Cir. 1982). Even if there is a genuine issue of material fact on the first prong of this test, the defendant is entitled to summary judgment if the plaintiff cannot establish the second prong (discrimination as the basis for the adverse action). Gillins, 148 F.3d at 416-17; Vaughan, 145 F3d at 201-02.

Viewing the evidence in the light most favorable to Coates, *a prima facie* case of race discrimination has been stated Concerning factors (1) and (2), there is no doubt that these are satisfied in the instant case, so the Court will not expound On them. Regarding factor (3), there is a dispute in the evidence as to whether he was performing his job at a level that met his employer's legitimate expectations. As to factor'(4), there is a dispute in the evidence as to whether the white supervisor selected was better qualified.

Taking the evidence in the light most favorable to the plaintiff, Coates has made out his *prima facie* case of discrimination. The burden of production is now on Virginia Power to articulate a legitimate, nondiscriminatory reason for its conduct Virginia Power's uncontested claim is that due to changes in the regulatory and technological environment, electric utilities must operate in an increasingly competitive marketplace To ensure their success in that marketplace, Virginia Power undertook Vision 2000 to review the company's operations and business practices This project

began around 1995. focusing on each business unit or organizational unit separately. Vision 2000 analyzed the organizational and operational needs of different groups and the potential for measures such as re-engineering, centralization, outsourcing, and changes in the work process. Vision 2000 identified hundreds of positions that should be eliminated. It was this process of reorganization which, led to the termination of Coates' employment. Virginia Power has articulated a legitimate nondiscriminatory reason, so under the McDonnell Douglas paradigm the burden thus shifts to the defendant to show pretext.

There is absolutely no indication that Virginia Power's offered legitimate non discriminatory explanation for their action is pretextual. The evidence indicates, that when supervisors were chosen by the 20+ Virginia Power managers meeting in Richmond, Virginia, the managers reviewed charts listing, in rank order, the supervisors in the pools from which they were selecting Nothing in the evidence before the Court indicates that the managers knew anything about the races of the supervisors they were selecting. Also, the evidence clearly indicates that Travis was not asked about Coates; not did Travis say anything (positive or negative about Coates to the other managers. Coates offers no evidence what so ever to contradict this. He does not offer an affidavit by anyone, or any evidence to affirm that race was a consideration in this meeting.

The evidence clearly shows that the applicants for the supervisory slots outnumbered the positions available, and that Virginia Power's reorganization was the reason for this. Further, it is not disputed that nine supervisory positions in the Northwest Region (which includes the Woodbridge District) were eliminated, and that seven of the supervisors who no longer had jobs were white. Last, it is not disputed that Travis selected an African-American to work for him as a supervisor at Travis' new assignment, and that the

Woodbridge District's new manager also selected an African-American to work as a supervisor in Woodbridge.

Coates' claim that Virginia Power's legitimate nondiscriminatory explanation for its action is in actuality a pretext for race discrimination is mere speculation, and the facts before the Court clearly indicate this. As speculation is not enough to defeat a motion for summary judgment 820 F.2d at 1386; Lovelace, 681 F.2d at 241-46, Defendant's Motion for Summary Judgment should be granted.

An appropriate Order shall issue.

UNITED STATES DISTRICT JUDGE

December 22, 1998
Alexandria, Virginia

Footnotes

[1]Plaintiff's Complaint initially contained two counts: Count I was a § 1981 claim alleging Plaintiff was terminated because of his race. Count II was another § 1981 claim, this one alleging that Plaintiff was retaliated against because he had engaged in protected activity, However, in Plaintiff's response to Defendant's Motion for Summary Judgment, Plaintiff concedes he cannot prove Count II, and asks the Court to "drop" this claim.

[2]In his response in opposition to Virginia Power's Motion for Summary Judgment, Coates submits a declaration describing various incidents which he did not describe in his deposition and which he contends also show that Travis bore racial hostility This declaration must be disregarded, both because it contradicts his deposition testimony and because nearly all

of it amounts to conclusory assertions and speculation not based on personal knowledge. See. Halperin, 128 F.3d at 198.

No. 99-1028

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALVIN EUGENE COATES, Plaintiff-Appellant,

v.

VIRGINIA POWER COMPANY, Defendant-Appellee.

May 31, 2000, Filed

ORDER DENYING REHEARING

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.